



DEPARTMENT OF LAW
OFFICE OF THE
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STATE CAPITOL
Phoenix, Arizona 85007

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BRUCE E. BABBITT
ATTORNEY GENERAL

76-256

August 4, 1976

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Mr. J. N. Trimble, Director
Arizona Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

Dear Mr. Trimble:

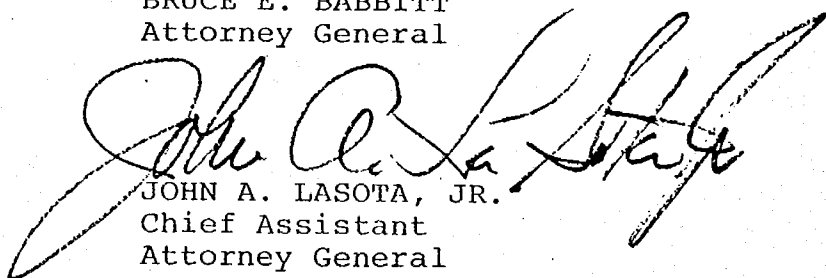
Our letter to you dated July 28, 1976 in response to a letter from Mr. Millard Humphrey dated September 23, 1975 contains a typographical error on the first page.

Please note that the second paragraph, second line reads: ". . . within the meaning of A.R.S. § 20-130 and" The proper statute is A.R.S. § 20-103. Would you please change your copy to reflect the proper statute.

If you have any questions, please call me at 271-4685.

Sincerely,

BRUCE E. BABBITT
Attorney General


JOHN A. LASOTA, JR.
Chief Assistant
Attorney General

JAL:b





OFFICE OF THE
Attorney General
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Phoenix, Arizona 85007

76-286
BRUCE E. BABBITT
ATTORNEY GENERAL

R75-616
McDugall

July 28, 1976

Mr. J. N. Trimble, Director
Arizona Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

Dear Mr. Trimble:

This letter is in response to a letter from Mr. Millard Humphrey dated September 23, 1975. Mr. Humphrey asked whether Contact Lens Guarantee, Inc. was engaging in the business of insurance by soliciting opticians, optometrists and ophthalmologists to enroll patients in a program guaranteeing such patients replacement of lost or damaged contact lenses at a reduced price from a specified practitioner for a fixed annual fee.

103 It is our opinion that Contact Lens Guarantee, Inc.'s program constitutes insurance within the meaning of A.R.S. § 20-130, and that Contact Lens Guarantee, Inc. is transacting insurance by soliciting membership in its program in violation of A.R.S. § 20-106. Cf. Atty.Gen.Op. R76-306 (dated July 28, 1976).

Contact Lens Guarantee, Inc. is neither a seller nor a manufacturer of contact lenses. Its indemnification or purchasers of contact lenses is not a warranty by a seller or manufacturer against defects in the lenses. It falls squarely within the definition used by the court in Anstine v. Lake Darling Ranch, 233 N.W.2d 723 (Minn. 1975), that:

. . . A contract which indemnifies where the indemnitor's conduct bears no relationship to the loss provides for indemnity for hire . . . and seems to be a commercial insurance contract subject to the laws regulating the insurance business.

(See also, Mein v. United States Car Testing Co., 115 O.A. 145, 184 N.E.2d 489 (1961); Olendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E.2d 676 (1938); Duffy v. Western Auto Supply Co., 134 Ohio 163, 16 N.E.2d 256 (1938); and 1 Couch, Cyclopedia of Insurance Law, § 1.15 (2d ed.)).



In Guaranteed Warranty Corp. v. State ex rel. Humphrey, 23 Ariz. App. 32, 533 P.2d 87 (1975), the Arizona Court of Appeals held that a contract whereby a company which neither manufactured nor sold television sets guaranteed the replacement of picture tubes which failed as a result of manufacturing defects constituted insurance. The court applied the five classical elements of insurance in reaching its decision. These elements are:

1. An insurable interest;
2. A risk of loss;
3. An assumption of risk by the insurer;
4. A general scheme to distribute the loss among the larger group of persons bearing similar risks; and
5. Consideration for the assumption of the risk. (See, W. Vance, Handbook of Insurance, § 1 at 2 (2d ed. 1930).

These elements are present in the program offered by Contact Lens Guarantee, Inc.

1. Insurable interest - Purchasers of contact lenses have an interest in possessing the lenses.
2. Risk of loss - Purchasers risk losing or damaging their contact lenses.
3. Assumption of risk - The practitioner is agreeing to replace lost or damaged lenses for a replacement fee that is below the price he would charge absent the agreement.
4. A general scheme - The practitioner is relying on the assumption that the replacement fee plus the service fee he receives from Contact Lens Guarantee, Inc. will exceed the cost of replacing lost or damaged lenses. This assumption is based on studies indicating that a small percentage of patients will lose or damage their contact lenses.
5. Consideration - The annual fee paid by patients to Contact Lens Guarantee, Inc. is the consideration paid for the right to purchase replacement lenses at a lower price than they would otherwise have to pay.

Inasmuch as the program of Contact Lens Guarantee, Inc. meets the five elements necessary to constitute insurance and it

is not a warranty since it is not made by a seller or limited to the character of the goods sold, it constitutes insurance and is subject to regulation by the Department of Insurance.

Sincerely,

BRUCE E. BABBITT
Attorney General

Rod McDougall
RODERICK G. McDOUGALL
Chief Counsel, Civil Division

RGM:cl